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No. 152.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

F. E. KEHRER,

Plaintiff in Error,

vs.

A. P. STEWART,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

BRIEF FOR DEFENDANT IN ERROR.

JNO. C. HART,
Attorney for Defendant.

THE FRANKLIN PRINTING AND PUB. CO.
ATLANTA, GA.

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STATEMENT OF THE CASE.

The plaintiff in error is the "chief clerk and manager" of the packing-house of Nelson-Morris & Co. Nelson-Morris & Co. are citizens of the State of Illinois. They were carrying on in the State of Georgia, city of Atlanta, in February, 1901, a packing-house business. The plaintiff in error was at that time "chief clerk and manager." Stewart is the tax-collector of Fulton county, and as such it becomes his duty to collect the taxes due the State from citizens within the city of Atlanta. On December 21, 1900, the General Tax Act was passed, and by paragraph 19 of section 2 of this Act, a tax was levied as follows: "Upon all agents of packing-houses doing business in this State two hundred dollars in each county where said business is carried on." The tax-collector demanded of plaintiff in error the two hundred dollars tax as "agent" of a packing-house doing business in this State. The plaintiff in error paid the tax under protest and to prevent

immediate seizure of his property and to avoid criminal prosecution.

At the May term, 1901, of the city court of Atlanta the plaintiff in error filed his petition therein claiming that Stewart was guilty of a trespass against him in exacting of and requiring him to pay this money, insisting that there was no law to warrant the collection, and that the demand and collection of it was without authority of law; laying his damages in the "sum of one thousand dollars or other such large sum." The plaintiff in error attacked the constitutionality of the Act which imposed this tax of two hundred dollars upon him, because, first, it was violative of the requirement in the Constitution of the State of Georgia which provides that "all taxation shall be uniform upon the same class of subjects and *ad valorem* upon all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

It is his further insistence that the Act is violative of the Fourteenth amendment to the Constitution of the United States, in that it deprived him of the right to work for his principal "without assuming the heavy burden of said tax, which is not imposed upon other citizens of the State occupying like positions with other lawful business enterprises," and to require of him this tax, "or in default to subject his property to seizure, levy and sale, and his person to arrest and imprisonment," would be to deprive him of the rights guaranteed him by the Constitution of the United States, and of his liberty and property without due process of law, and deny to him the equal protection of the law. He further charged that the attempted classification of subjects for specific taxation as evidenced by said paragraph 19 of section 2 was unreasonable, arbitrary, unnatural and artificial and was, as applied to him, unlawful, null and void.

A demurrer to the petition was filed and after argument overruled, and Stewart, who had filed the demurrer, carried the case to the Supreme Court of Georgia, where the judgment

overruling it was reversed. The petition was then amended in the lower court, making two other questions, viz.: First, that the Act imposing the tax is *ex post facto,* and impairs the obligation of his contract; and, second, that the Act is an illegal interference with interstate commerce. Stewart renewed his demurrer and the court sustained the same. Kehrer excepted to this judgment. At the hearing of this case before the Supreme Court of Georgia at the October term, 1902, the court affirmed the judgment of the lower court, sustaining the demurrer, and it is from this last judgment the writ of error is brought.

BRIEF AND ARGUMENT.

It will be noted from the foregoing statement that this case has been twice before the Supreme Court of Georgia, and each time the question involved was whether or not the demurrer filed thereto was good. The question to be determined, therefore, taking the allegations of his petition to be true, was the plaintiff in error liable for the tax exacted of him by the tax-collector?

I.

THE TAX LEVIED WAS AN OCCUPATION TAX.

It is evident from the allegations in the plaintiff's petition that the business of which he was the agent was a "packing-house." Plaintiff in error was the "chief clerk and manager." It was his vocation and occupation. He was carrying on the vocation "of a packing-house agent." The section of the Act in question is as follows: "Upon all agents of packing-houses doing business in this State two hundred dollars in each county where said business is carried on."

II.

THE SUPREME COURT OF GEORGIA CONSTRUES THIS ACT.

In the 115 Ga. p. 186, when this case was first before the Supreme Court of Georgia, the court construed this Act of the Legislature, and the construction there given will be accepted by this court. The tax is not laid upon packing-houses, but is laid upon "agents of packing-houses. It is a "vocation" or "occupation" tax. Such agent though

he may represent a non-resident, is himself doing business in the State. The word "agent" as used in this paragraph means managing or superintending agent and includes every agent who is the *alter ego* of the principal by whom he is employed. It is apparent from section 4 of this Act that the tax is a "vocation" tax. The agent of the packing-house shall pay the tax "at the time of commencing to do business." The word "business" here manifestly refers to the business of the agent, and not that of the principal, for it is the agent and not the principal who shall pay the tax "at the time of commencing to do business."

III.

IS THE ACT IN QUESTION VIOLATIVE OF PARAGRAPH 1 OF SECTION 2 OF ARTICLE 7 OF THE CONSTITUTION OF THE STATE OF GEORGIA?

"All taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." The Supreme Court of Georgia in Kehrer *vs.* Stewart, 115 Ga. 189, has decided that this Act does not violate that provision of the State Constitution. The Court said: "The General Assembly of this State in the imposition of specific taxes upon occupations has the constitutional power to classify subjects for taxation, taxing some and omitting to tax others; and the principle of uniformity required by this paragraph of the Constitution is not violated so long as a given tax is made uniform upon all individuals belonging to the particular class upon which it is imposed. Citing Singer Mfg. Co. *vs.* Wright, 97 Ga. 114, and cases therein cited." The Legislature has the right to classify and so has classified. It has created a new class of occupa-

tions to be taxed, viz.: "agents of packing-houses," and has imposed an occupation tax upon all of that class.

The power of the General Assembly of Georgia to classify for the purpose of taxation is unquestionable.

Cooley on Taxation, p. 384.
Desty on Taxation, vol. 1, p. 96.
Williams *vs.* Fears, 110 Ga. 594.
Cutliff *vs.* Mayor of Albany, 60 Ga. 598-9.
Shepard *vs.* County Commissioners, 59 Ga. 536.
Davis & Co. *vs.* Mayor and Council of Macon, 64 Ga. p. 129.
Singer Mfg. Co. *vs.* Wright, 33 Fed. Rep. 126.
American Harrow Co. *vs.* Shaffer, 68 Fed. Rep. 750.
Mutual Reserve Fund Life Ass'n *vs.* Augusta, 109 Ga. 79.

It will be seen also from the foregoing decisions that there is nothing in the Constitution of Georgia which inhibits the taxation of certain vocations or occupations and to exempt, by failing to tax, other occupations.

IV.

IS THE ACT IN QUESTION VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

This Act does not deny to any person the "equal protection of the laws" for all persons of the class designated and described by the occupation in which they are engaged are subject to the same specific tax. The agent of the domestic packing-house is liable to the tax as is the agent of the foreign packing-house. The object of the fourteenth amendment to the

Federal Constitution was to preclude the several States from discriminating against citizens of other States.

Cooley on Taxation, p. 99.
Desty on Taxation, vol. 1, p. 223.
Slaughter House Case, 16 Wallace 36.

The specific tax levied upon persons engaged in the conduct of a particular business is in no sense obnoxious to the fourteenth amendment.

Williams *vs.* Fears, 110 Ga. 584.

The Constitution imposes no restriction on the States in the levy of taxes other than that there shall be no discrimination against citizens of other States.

Davidson *vs.* New Orleans, 96 U. S. 105.
Giozza *vs.* Tiernan, Sheriff of Galveston, 148 U. S. 657.
Hager *vs.* Reclamation District 108, 111 U. S. 709.

The contention of the plaintiff in error that the effect of the Act in question would be to deprive him of his liberty and property without due process of law is answered by an unbroken line of authorities to the effect that due process of law within the meaning of the fourteenth amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government.

Giozza *vs.* Tiernan, Sheriff of Galveston, 148 U. S. 657.

The Act under consideration bears equally upon all citizens of the State of Georgia or residents therein who desire to follow the calling of "agents of packing-houses." It applies to both the agent of the local packing-house as well as to the agent of the foreign packing-house who desires to carry on a domestic business. The Act creates for taxation a class, viz.: "agents of packing-houses." Unquestionably the intent

of the General Assembly was to impose a tax on the occupation or vocation of "agents of packing-houses."

V.

IS THE ACTION IN QUESTION OFFENSIVE TO ARTICLE 1, SECTION 10, PARAGRAPH 1 OF THE FEDERAL CONSTITUTION?

This provision inhibits any State from passing an *ex post facto* law or law impairing a contract. It is the insistence of plaintiff in error that he had a contract with Nelson-Morris & Co., under which he was to be paid a stipulated sum per week for services as chief clerk and manager of their house in Atlanta, Georgia. This contract was entered into some five months before the passage of the Act. Under these facts the statute is clearly not retroactive as applied to petitioner. It does not relate to any acts done prior to its passage, but only to the designated occupation after the commencement of the year following its passage. Nor is the petitioner's contract violated. It appears that his contract is not for any definite time. He was apparently under no obligation to continue the services after the imposition of the tax on his occupation. The statute would not be objectionable as impairing the obligation of his contract, for the contract was entered into with the knowledge that the State has the right to impose taxes upon "occupations." Were this not true private persons would enter into contracts for indefinite periods, thereby depriving the Legislature and the State of the right to raise revenue by taxing such "occupations."

VI.

IS THE STATUTE AN ILLEGAL INTERFERENCE WITH INTERSTATE COMMERCE?

It will be noted that the Act as construed by the Supreme Court of Georgia does not impose a tax upon the goods shipped from the State of Illinois to the State of Georgia, or for carrying on the business of distributing the goods so shipped in pursuance of orders previously received, but the particular business subject to be taxed is the carrying on of that part of the business which is purely of a domestic character. The plaintiff in error was engaged in doing both. The shipping of dressed meats into this State in pursuance of orders heretofore received from citizens of the State of Georgia, would be interstate commerce, and a tax upon that business or upon the agent who distributed the goods so ordered would be unconstitutional, as an illegal interference with interstate commerce, and would fall within the case of Caldwell *vs.* N. C., 187 U. S. 622. The particular tax levied in this case is on the agent of the packing-house who undertakes and does sell certain dressed products not previously sold, and which are kept in storage awaiting customers. It is the domestic portion of his business that is taxed. Under the first statement of fact the plaintiff in error as the managing agent was protected from State taxation for the reason the business was interstate commerce; but when he undertook also to carry on a domestic business the latter business became subject to State taxation. The Supreme Court of Georgia recognizes that it is not within the power of the State to levy and collect a tax out of one who as the representative of a principal residing in another State takes orders and receives the goods in this State and distributes them among the customers from whom he obtains such orders. Such business would be interstate commerce and neither the agent nor goods would be liable to the

tax. See Stone *vs.* The State, 117 Ga. 292. The tax here levied and collected is because the plaintiff in error is engaged in a domestic business in that the goods he offers for sale (though shipped from outside of the State and into the State of Georgia) were here stored and offered for sale in open market, thereby becoming in character a domestic business. "The Constitution of the United States protects such goods only to the extent of preventing State legislation which imposes on them, because of their origin, burdens which are not imposed upon goods the product of such States imposing such burdens."

Kehrer *vs.* Stewart, 117 Ga. 969.

VII.

PLAINTIFF IN ERROR WAS ENGAGED IN BOTH A DOMESTIC AND INTERSTATE COMMERCE BUSINESS.

The Supreme Court of Georgia held that he was liable as an "agent of a packing-house" doing business in this State relative to the domestic feature of the business. It was expressly ruled no tax could be imposed upon him for doing the interstate business. This differentiation is unquestionably sound. The plaintiff in error can not engage in one business that is exempt from taxation and thereby render it, or himself, exempt from taxation by adding to his original occupation another which is subject to taxation. "If he would continue to pursue the taxed business let him pay the tax imposed upon all who are engaged therein." If he wishes to do only interstate business this act furnishes no obstacle in the way of taxation. This is equitable and just and offends no

principle of right or justice nor any provision of this State or of the Federal Constitution.

Respectfully submitted,

JNO. C. HART,
Attorney for defendant.